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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 244

READY TRUCK LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING.

J. AUSTIN LATIMER,
GERALD T. WILEY,
Counsel for Appellant.

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THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees.

PETITION FOR REHEARING.

Ready Truck Lines, Inc., the appellant in this cause, respectfully prays that this Honorable Court grant a rehearing of the above entitled cause, and respectfully shows:

1. The question here presented was not passed upon in the per curiam order of November 10, 1941.

The appellees filed a motion to affirm the judgment of the District Court upon the ground that the appeal presents no substantial question.

The *per curiam* order of this Court is as follows:

> "*Per Curiam:* The motion to affirm is granted and the judgment is affirmed. Sec. 209 (a) of Part II of the Interstate Commerce Act, 49 U. S. C. Sec. 309 (a); United States *v.* Maher, 307 U. S. 148, 153-4. Mr. Justice Jackson took no part in the consideration and decision of this case."

Sec. 209 (a) of Part II of the Interstate Commerce Act provides for the granting by the Commission of permits to contract carriers by motor vehicle, and states specifically that "if any such carrier or a predecessor in interest was in *bona fide* operation as a contract carrier by motor vehicle *on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time* * * *," the Commission shall issue such permit without the necessity of showing that the operation is consistent with the public interest.

The case of *United States* v. *Maher*, 307 U. S. 148, involved the application of a common carrier by motor vehicle for a certificate under Section 206 (a) of that Act, which section granted similar "grandfather" rights to a common carrier in *bona fide* operation on June 1, 1935, and continuously since.

But at this point the similarity between our case and the *Maher* case ends. Appellant has not raised any of the questions raised and decided in the *Maher* case.

In the *Maher* case, the carrier filed its application under the "grandfather" clause, and admittedly failed to show continuity of "grandfather" operations. The evidence admittedly showed that Maher had conducted "anywhere-for-hire" operations from 1931 to May 29, 1936, and then ceased these operations and instituted "regular route" operations. Maher contended: (a) that as a matter of law he was entitled to "grandfather" clause authority to conduct "anywhere-for-hire" operations, notwithstanding the cessation of these operations on May 29, 1936, and (b) that as a matter of law he was entitled to a hearing and determination of the question of whether public convenience and necessity required his "regular route" operations instituted on May 29, 1936, notwithstanding his failure to file an application based upon public convenience and necessity.

This Court, in *Maher* v. *U. S.*, 307 U. S. 148, decided those and only those points, upon an interpretation of the statute involved, and said, with reference to controverted matters of fact, that "Their determination Congress entrusted to the Commission".

The case at bar, involving the Commission's order in the matter of READY TRUCK LINES, INC., appellant, involves entirely different questions, as can be readily seen by appellant's Assignment of Errors and as pointed out in appellant's Brief opposing Motion to Affirm.

Appellant presents the following substantial propositions, none of which were passed upon in the *Maher* case:

(a) Appellant was not afforded a full hearing by the Commission;

(b) Appellant was not afforded a fair hearing by the Commission; and

(c) There is absolutely no competent evidence in the record of the Commission to support its findings and order.

This Court has repeatedly held that these are substantial questions. *New England Divisions Case,* 261 U. S. 184; *Morgan* v. *United States,* 298 U. S. 468; *Morgan* v. *United States,* 304 U. S. 1; and *Chicago Junction Case,* 264 U. S. 258, wherein it was said:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence or to make an essential finding without supporting evidence is arbitrary action."

Appellant, after a thorough search, has not found any decision wherein this or any other Court has passed upon the action or conduct of any Commission or hearing officer similar to the action and conduct of the Commission and its hearing officer in this case. It is extremely doubtful whether a

hearing of the character of the hearing afforded Appellant ever occurred before.

The Assignment of Errors states fully the conduct complained of. A few of the points are as follows:

(a) Protesting carriers, after entering into a stipulation whereby appellant withdrew that part of his application pertaining to the major portion of Ohio, and whereby the protestants agreed not to oppose the grant of certain other operating authority, were permitted to introduce pages and pages of testimony in opposition to the grant of the other authority, in direct violation of their stipulation. At this time, appellant had already withdrawn the part of its application in accordance with the stipulation.

(b) Protesting carriers "cross-examined" each other's witnesses. By means of this ruse, they were permitted to use leading and suggestive questions throughout the hearing on matters not adverse to but in the interest of the cross-examining protestants.

(c) Protesting carriers were permitted to introduce pages of testimony concerning rate differences between appellant and some of its common carrier competitors. In the first place there are many economic factors justifying rate differences between contract carriers and common carriers, and the Commission has repeatedly recognized the justification for such differences. But aside from that, such testimony was absolutely incompetent. This was not a rate hearing. There was no complaint filed against appellant regarding unjustly high or low rates. This was a hearing on appellant's application for "grandfather" operating rights, and the sole question for the Commission's determination was: "Over what routes or in what territory has appellant been in continuous operation on and since July 1, 1935?"

(d) Protesting carriers were permitted to introduce the rankest sort of hearsay testimony. For example, one wit-

ness testified that appellant owned no equipment, stating that his source of information was some attorney with whom he had had a telephone conversation, had never seen, and whose name, address or telephone number the witness did not know.

(e) Protesting carriers obtained from the Commission a *subpoena duces tecum* commanding appellant to produce at a hearing all correspondence, bills of lading, manifests, shipping receipts, papers, documents, leases, contracts, agreements, etc., from January 1, 1934, to February 1, 1940. Appellant properly refused to obey the subpoena, which would have required bringing several large truck loads of papers, on advice of counsel, because the subpoena was so broad as to constitute an unreasonable search and seizure (See *Wilson* v. *U. S.*, 221 U. S. 366; *Hale* v. *Henkel*, 201 U. S. 43). The Commission censured appellant and commented unfavorably upon the refusal to obey this subpoena, notwithstanding that the refusal to obey an illegal subpoena is the usual and approved method of resistance. *Wilson* v. *U. S.*, 221 U. S. 366; Hausel and Walser, Federal Criminal Cases, Sec. 147.

(f) Notwithstanding an order of the Commission vacating a prior reference of the matter to one examiner for hearing, the Commission relied upon some of the testimony submitted to that examiner at that hearing.

(g) The Commission granted protestants a rehearing based upon alleged newly discovered evidence, although the record shows that protestants had knowledge of the so-called "evidence" and incorporated the allegations in a protest filed long before the original hearing; and, on the contrary, the Commission refused appellant a rehearing based upon newly-discovered evidence in the form of old shipping documents found by a disinterested shipper, Na-

tional Tea Company, among old records believed to have been previously destroyed by the shipper.

2. The questions presented, in addition to being substantial, are important.

That the questions involved in this appeal are substantial was shown above. *New England Divisions Case,* 261 U. S. 184; *Morgan* v. *United States,* 298 U. S. 468; *Morgan* v. *United States,* 304 U. S. 1; *Chicago Junction Case,* 264 U. S. 258.

That the questions involved are important to appellant undoubtedly will be admitted by appellees. The record shows that appellant has been engaged in the motor carrier business for many years, operated more than fifty tractors and fifty trailers as of June, 1940 (the number has since then almost doubled), and had contracts to transport truckload shipments of canned goods, groceries, packing house products, feed, fertilizer, and roofing materials for one hundred ten (110) different manufacturers or distributors. The largest packers, canneries, grocers and roofing material companies in the middle west are among them.

That the appeal is important to the public is evident from the facts stated in the foregoing paragraph. With the daily increasing shortage of transportation facilities, shippers of these commodities, important to the feeding and housing not only of military forces, but also of civilians in defense work, find the problem of prompt and efficient distribution ever increasing.

And finally, with reference to the motor carriers of this nation, the questions involved in this appeal are all important. Since the Interstate Commerce Commission was given authority by Congress to regulate motor carriers, over 200,000 applications of one kind or another have been filed by motor carriers. Unquestionably the Commission has on the whole been fair in the administration of the law. But,

as is evident from the foregoing, the Commission has failed in its duty to be fair in this case. To deny this appeal is to approve the conduct of the hearing officer to whom the case was assigned by the Commission. And to approve of such flagrant violations of the right to a fair, full, impartial hearing is to announce to every motor carrier in the nation that our governmental bodies need no longer abide by the rules because such action no longer involves a substantial question.

For the foregoing reasons, it is earnestly submitted that this petition be granted.

Respectfully submitted,

J. AUSTIN LATIMER,
GERALD T. WILEY,
Counsel for Petitioner.

Certificate of Counsel.

I, Gerald T. Wiley, one of the counsel for the above named Appellant, READY TRUCK LINES, INC., do hereby certify that in my opinion the foregoing petition has merit, and that the petition is presented in good faith and not for delay.

GERALD T. WILEY,